Supreme Court, U.S.
FILED
APR 4 1996
CLERK

No. 95-1240

In The
Supreme Court Of The United States
October Term, 1995

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari
To The Louisiana Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a white defendant has standing under *Rose v. Mitchell*, 443 U.S. 545 (1979), to bring an equal protection claim based upon the exclusion of blacks from service as state grand jury foremen?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Terry Campbell, a white male, was indicted by the Grand Jury of the Thirteenth Judicial District, Parish of Evangeline, State of Louisiana, on February 4, 1992, in which petitioner was charged and subsequently convicted in Docket No. 45,690-F of the second degree murder of James L. Sharp, also a white male, in violation of La. R.S. 14:30.1. *See Petition*

For A Writ Of Certiorari at Appendixes, E-8, E-30, and E-35 through E-37 (hereinafter Pet. at App., at ___), and *Appendixes* herein attached at 3a (hereinafter App. at ____).

Prior to trial, petitioner, through defense counsel Jesse B. Hearin, filed a *Motion To Quash Grand Jury Indictment* in the trial court, alleging that the indictment was defective because "the grand jury foreperson selection process in Evangeline Parish is discriminatory and violates the Sixth and the Fourteenth Amendment to the United States Constitution as well as Article I, Section 2, Article 1, Section 15 and Article I, Section 16, of the Louisiana Constitution." See *Pet. at App.*, I-2. Following a hearing on the motion before the Honorable Preston N. Aucoin, Judge, Thirteenth Judicial District, presiding, on December 2, 1993, the motion was orally denied; subsequently the trial court issued a written judgment on December 6, 1993, confirming the denial of the motion to quash. *See Pet. at App.*, E-1 through E-39, and D-1 through D-2.

Following a 12-person jury trial, petitioner was convicted as charged on May 12, 1994. In a *Motion For New Trial* filed in the trial court by defense counsel Richard V. Burnes and Raymond J. LeJeune, petitioner again claimed his previously denied motion to quash was meritorious because petitioner had been "charged by a grand jury indictment which was returned by a grand jury which was illegally and unconstitutionally selected in that the grand jury foreperson selection process in Evangeline Parish is discriminatory and violates the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article I, Section 2, Article 1, Section 15, and Article 1, Section 16, of the Louisiana Constitution," and thereby requested a new trial on this basis, *inter alia*. *See Pet. at App.*, H-2, H-1 through H-9. Following a contradictory hearing on May 20, 1994, the motion for new trial was subsequently denied; petitioner was thereby sentenced to the mandatory sentence of

life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. *See Pet. at App.*, C-1 through C-8 and La. R.S. 14:30.1.

During appeal to the Louisiana Court of Appeal, Third Circuit, through defense counsel, Mr. Burnes and Mr. LeJeune, petitioner again asserted as Assignment of Error No. 1 the trial court's denial of the motion to quash because the petitioner's indictment "was returned by a Grand Jury which was illegally and unconstitutionally selected in that the Grand Jury foreperson selection process in Evangeline Parish was discriminatory and in violation of Louisiana and United States constitutional provisions". Also alleged as Assignment of Error No. 10 on appeal was the trial court's denial of the motion for new trial; however, petitioner did not distinguish, from among the 11 reasons previously cited to the trial court, the underlying basis for Assignment of Error No. 10. In the original motion for new trial filed with the trial court, one reason, *inter alia*, for relief was based upon an allegation of racial discrimination in the selection of grand jury foremen in Evangeline Parish. *See Pet. at App.*, G-1 and G-3, G-1 through G-4, and H-1 through H-9.

In *State of Louisiana v. Terry Campbell*, 651 So. 2d 412 (La. Ct. App. 3d Cir. 1995), the Louisiana Court of Appeal, Third Circuit, on March 1, 1995, in addressing petitioner's first assignment of error in Docket No. CR-94-1140, reversed the trial court's finding that petitioner, a white male, lacked standing to allege racial discrimination against blacks in the grand jury foreman selection process of Evangeline Parish. *See Id.*, 651 So. 2d at 413-414 and *Pet. at App.*, B-1 through B-5. The Third Circuit remanded the proceedings back to the trial court for further review of the petitioner's racial discrimination claim based upon due process and equal protection. *See Id.* Given the action by the Third Circuit, that reviewing court did not reach the other assignments of error. *See Id.* and *Pet. at App.*, B-5.

On March 31, 1995, the District Attorney for the Thirteenth Judicial District filed an application for writ of certiorari and review with the Louisiana Supreme Court; in an opinion issued on October 2, 1995, the Louisiana Supreme Court in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), granted the State's writ application in Docket No. 95-K-0824, and subsequently reversed the prior ruling by the Louisiana Court of Appeal, Third Circuit, in *State of Louisiana v. Terry Campbell*, 651 So. 2d 412 (La. Ct. App. 3d Cir. 1995), holding that petitioner lacked standing under both the equal protection clause and the due process clause to bring a claim of racial discrimination in the selection of grand jury foremen under *Rose v. Mitchell*, 443 U.S. 545 (1979) and *Hobby v. United States*, 468 U.S. 339 (1984). *See also Pet. at App.*, A-1 through A-2, and A-3 through A-10. The Louisiana Supreme Court also remanded the case back to the Louisiana Court of Appeal, Third Circuit, for consideration of petitioner's remaining assignments of error. A petition for rehearing with the Louisiana Supreme Court was subsequently denied on November 3, 1995. *See State of Louisiana v. Terry Campbell*, 661 So. 2d 1374 (La. 1995), *petition for cert. filed*, 64 U.S.L.W. 3535 (Jan. 31, 1996)(No. 95-1240), and *Pet. at App.*, F-1.

On January 31, 1996, petitioner filed the instant *Petition For A Writ Of Certiorari* with this Honorable Court. Pursuant to *Rules of the Supreme Court of the United States* (effective October 2, 1995), petitioner, through defense counsel Mr. Richard V. Burnes and Dmitrc I. Burnes, notified Honorable J. William Pucheu, District Attorney, Thirteenth Judicial District, Parish of Evangeline, Honorable Richard W. Vidrine, Assistant District Attorney, Thirteenth Judicial District, Parish of Evangeline, and Honorable Richard P. Ieyoub, Attorney General, Louisiana Department of Justice, of the instant petition, and that pursuant to Sup. Ct. R. 15.3 (1995), a brief in opposition to the petition for certiorari would be due March 6, 1996.

Pursuant to a request for assistance by District Attorney J. William Pucheu, the Attorney General is filing the instant *Respondent's Brief In Opposition To Petition For Writ Of Certiorari*. In a letter sent by Federal Express to this Honorable Court on February 23, 1996, the State of Louisiana respectfully requested an extension of time upon which to file the brief in opposition. *See App.* at 4a, 5a. Defense counsel Dmitrc I. Burnes responded in a letter dated February 26, 1996, that defense counsel had no opposition to the requested extension of time. *See App.* at 6a. In a letter dated March 4, 1996, this Honorable Court informed the State of Louisiana that the extension of time within which to file a response to the petition for a writ of certiorari was granted, and that the brief was now due on or before April 5, 1996. *See App.* at 7a.

Subsequent to the filing of the instant petition, the Louisiana Court of Appeal, Third Circuit, has denied relief on petitioner's remaining assignments of error, and affirmed petitioner's conviction and sentence, with the exception of a remand to the trial court to amend the court minutes to reflect that the petitioner is entitled to credit for time served. *See State of Louisiana v. Terry Campbell*, No. 94-1140, slip op. (La. Ct. App. 3d Cir., 3/13/96), ____ So. 2d _____, 1996 WESTLAW 109052 (La. Ct. App. 3d Cir., 3/13/96). Under La.Ct. App. R. 2-18.1 (1995), petitioner had 14 days to petition the Louisiana Court of Appeal, Third Circuit for a rehearing, or if no rehearing is requested, under La.Sup. Ct. R. 10, § 5 (1995), petitioner had 30 days from March 13, 1996, to file an application for writ of certiorari and review with the Louisiana Supreme Court, before the judgment is final in state court. Petitioner filed a petition for rehearing with the Louisiana Court of Appeal, Third Circuit, on Friday, March 29, 1996.

SUMMARY OF THE ARGUMENT

In opposing the petitioner's application for writ of certiorari, the State of Louisiana argues that because the matter is still pending in state courts upon questions of federal law, this Honorable Court lacks jurisdiction under 28 U.S.C. § 1257 to exercise this Court's supervisory jurisdiction. Further, the State of Louisiana contends that Louisiana Supreme Court's decision in *State v. Campbell*, 661 So. 2d 1321 (La. 1995), is consistent with prior decisions of this Honorable Court. Additionally, any conflict between the *Campbell* decision and decisions of the Eleventh Circuit of the United States Court of Appeals is clearly explained by the fact that those federal decisions cited by the petitioner herein pre-dated this Court's decision in *Hobby v. United States*, 468 U.S. 339 (1984), and their validity today is highly questionable. Further, any conflict between the Fifth Circuit of the United States Court of Appeals in *United States v. Cronn*, 717 F. 2d 164 (5th Cir. 1983) and those decisions of the Eleventh Circuit are equally explainable in that the latter should not carry much weight, again in light of the *Hobby* decision. Finally, if this Honorable Court decides supervisory review is necessary, the State of Louisiana would respectfully argue that such review should be limited to the only federal question properly before this Court, i.e., whether a white defendant has standing under *Rose v. Mitchell*, 443 U.S. 545 (1979) to bring a claim under the equal protection clause that blacks have been excluded from service as state grand jury foremen.

ARGUMENT

I. Given that petitioner's case may still be subject to further judicial review in state court on possible federal questions of law, petition for writ of certiorari should be dismissed for want of jurisdiction.

In granting a petition for writ of certiorari, this Honorable Court is limited by 28 U.S.C. § 1257 to review *"[f]inal judgments or decrees* rendered by the highest court of a State in which a decision could be had..." (emphasis added). *See also Pet.* at 3. In the instant case, the Louisiana Supreme Court, while admittedly denying an issue of federal law concerning one assignment of error, remanded the matter back to the Louisiana Court of Appeal, Third Circuit, for consideration of petitioner's remaining assignments of error. *See State of Louisiana v. Campbell*, 661 So. 2d 1321 (La. 1995), *rev'ing, State of Louisiana v. Campbell*, 651 So. 2d 412 (La. Ct. App. 3d Cir. 1995). Pursuant to the Louisiana Supreme Court's mandate, the Louisiana Court of Appeal, Third Circuit, on March 13, 1996, reviewed the remaining nine assignments of error (an additional assignment of error was abandoned as being assigned but not briefed), and affirmed petitioner's conviction and sentence. Petitioner's claims for relief on appeal include both issues of Louisiana and federal law, including but not necessarily limited to, petitioner's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel. *See State of Louisiana v. Campbell*, No. 94-1140, slip op. (La. Ct. App. 3d Cir., 3/13/96), ____ So. 2d _____, 1996 WESTLAW 109052 (La. Ct. App. 3d Cir., 3/13/96). The instant petition for writ of certiorari was mailed by the petitioner, as pointed out above, on January 31, 1996, forty-two days **before** the March 13, 1996, decision of the Louisiana Court of Appeal, Third Circuit. Moreover, as allowed by La.Ct. App. R. 2-18.1 (1995), petitioner has filed a petition for rehearing with the Louisiana Court of Ap-

peal, Third Circuit. If no rehearing is timely requested, under La.Sup. Ct. R. 10, § 5 (1995), petitioner had 30 days from March 13, 1996, to file an application for writ of certiorari and review with the Louisiana Supreme Court, before the judgment is final in state court. Further, if a rehearing was timely requested but denied, petitioner would have 30 days to seek review from the order denying the rehearing. Finally, if a rehearing is timely requested and granted, the aggrieved party would have 30 days to seek review with the Louisiana Supreme Court from the lower court's judgment on rehearing.

Given the pending status of petitioner's appeal, the State of Louisiana responds that in order to avoid piecemeal litigation on possible federal issues of law involving the same petitioner, this Honorable Court should decline the instant application for petition for writ of certiorari without prejudice until all matters of federal law are resolved by the Louisiana courts. See Robert L. Stern et al., *Supreme Court Practice* at 90 (7th ed. 1993). Clearly the instant judgment in this matter is not final. Because this Honorable Court's supervisory jurisdiction is necessarily limited to final judgments of a state's highest court of last resort where a substantial federal question has been properly raised and necessarily decided upon, the context of the instant litigation necessitates a ruling by this Honorable Court that the matter is not yet ready for review. Clearly the remand of the matter from the Louisiana Supreme Court back to the Louisiana Court of Appeal, Third Circuit, indicated that matters of substance remained unresolved; it is equally clear that what was left unresolved was more detailed than simply a lower court performing a ministerial act, for example where a lower court simply enters a judgment at a higher court's direction. *See Department of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 267 (1942). Moreover, a judgment to this Honorable Court should be final not only as to all parties, but also as to the whole subject matter involving all possible causes of action. See *Collin v. Miller*, 252

U.S. 364, 370 (1920). Most important to the instant case, the remand of a case that leaves open some matter that is not simply ministerial and which might itself create a federal question, means, *ipso facto*, that the judgment is not yet final, and thus, is not yet subject to judicial review by this Honorable Court. *Supreme Court Practice* at 94-95; *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 632-33 (1981); *O'Dell v. Espinoza*, 456 U.S. 430 (1982); and *Pope v. Atlantic Coast Line Rail Co.*, 345 U.S. 379, 382 (1953). *See also North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973)(requiring finality of state court judgments avoids piecemeal review by federal courts of state court decisions.) *Contrast Brady v. Maryland*, 373 U.S. 83, 85 n. 1 (1963)(review granted on federal question because resolution of that issue would decide whether suppression of evidence would require retrial on the merits as well as on the issue of punishment).

Another reason counseling hesitation by this Court to grant review at this juncture is the policy consideration of limiting federal review of state courts' determination of federal constitutional issues as a means to minimize federal intrusion into state affairs. *Supreme Court Practice* at 95. Furthermore, this Court has often recognized and insisted that state courts be allowed the first opportunity to pass upon federal constitutional challenges to state action in the first instance, and that state courts, as their federal counterparts, are equally as competent in adjudicating federal constitutional claims. *Allen v. McCurry*, 449 U.S. 90, 105 (1980)(confidence in state courts to adjudicate federal claims). This Honorable Court had also adopted a policy of allowing state courts the opportunity to correct any possible constitutional violation caused by state action. *Picard v. Connor*, 404 U.S. 270, 277-278 (1971). Most compelling here is that further proceedings pursuant to a remand by a state supreme court to a lower state court to resolve other issues of federal law provides a strong basis by which this

Court should rule that the pending state court judgment is not final, and thus, not reviewable.

Petitioner should be required to establish to this Court's satisfaction why federal review at this juncture is necessary. Petitioner has failed to do so. Allowing a review at this point runs counter to the general rule that only final judgments of a state's highest court of last resort are reviewable by this Honorable Court. *See Flynt v. Ohio*, 451 U.S. 619, 622 (1981)(holding no important federal interests would be eroded if state criminal proceedings went forward following denial of a federal claim of selective and discriminatory prosecution under the equal protection clause.) [1]

Petitioner certainly has failed to establish that a federal question or federal questions raised by the instant petition would be lost **but for** this Court's invoking its supervisory jurisdiction even though no final judgment has yet been rendered.

In *Flynt, supra*, this Honorable Court held that it lacked jurisdiction under 28 U.S.C. § 1257 to review a state Supreme Court ruling, which had rejected a federal claim of *Hustler* publisher Larry Flynt concerning discriminatory prosecution under obscenity laws. Even though the First and Fourteenth amendments to the U.S. Constitution were involved in the de-

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[1] The State of Louisiana has not reproduced the opinion of *State of Louisiana v. Terry Campbell*, No. 94-1140, slip op. (La. Ct. App. 3d Cir., 3/13/96), ____ So. 2d _____, 1996 WESTLAW 109052 (La. Ct. App. 3d Cir., 3/13/96), given the length of the decision, the added costs for printing and reproduction, and the burden on the petitioner to establish why review should be granted. However, the decision is available to this Honorable Court through the Westlaw service, and petitioner has the option to include that decision if he opts to file a reply brief under Sup.Ct.R. 15.6., which is in compliance with Sup.Ct.R. 14.1 (i) (ii), and R. 15.8.

cided federal claim, this Court held that there was no final judgment, and that none of the four exceptions to the general rule that only final judgments are reviewable applied, citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-485 (1975). In *Flynt*, this Court was satisfied that federal review could wait until final judgment without any adverse impact upon important federal interests. Moreover, a state court's decision that an earlier ruling by that court would be deemed law of the case would not affect the supervisory jurisdiction of this Honorable Court to re-examine the earlier state court rulings. *Hathorn v. Lovorn*, 457 U.S. 255, 261-62 (1982)(Supreme Court has jurisdiction to consider all substantial federal questions determined in the stages of earlier state proceedings; whether such a federal claim is untimely under state procedural rules is not generally an independent and adequate state basis upon which further federal review is barred). *See also Whitus v. Georgia*, 385 U.S. 545 (1967)(holding that denial of defendant's claim that grand jury was selected in a discriminatory manner was reviewable after final judgment of conviction, but not after interlocutory appeal permitted under state law). *Contrast California v. Stewart*, 384 U.S. 436 (1966)(state court's reversal of conviction on federal constitutional ground and remand for a new trial did not bar federal review because an acquittal would possibly preclude such review).

The State is cognizant of this Court's decision in *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945), where Mr. Justice Frankfurter, in writing for the Court, acknowledged a "penumbral area" for the general rule that only final judgments are reviewable by this Honorable Court. The State urges that to grant review in the instant petition could possibly result in piecemeal resolution of federal questions of law involving the same petitioner. Mr. Justice Frankfurter wrote: "...Of course, where the remaining litigation may raise other federal questions that may later come here, to allow review of

an intermediary adjudication would offend the decisive objection to fragmentary reviews." *Id.*, 326 U.S. at 127.

For the foregoing reasons, the State of Louisiana respectfully requests the petition for certiorari be dismissed for lack of a final judgment unless the petitioner establishes to this Court's satisfaction why an exception under *Cox Broadcasting Corp., supra*, should apply.

II. Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), is consistent with decisions of this Honorable Court.

In the petition for writ of certiorari, petitioner claims that Louisiana Supreme Court's decision is flatly inconsistent with this Honorable Court's decisions in *Peters v. Kiff*, 407 U.S. 493 (1972) and *Powers v. Ohio*, 499 U.S. 400 (1991). *Pet.* at 4. Moreover, petitioner claims that the Louisiana Supreme Court "has decided important questions of federal law that have not been, but should be, settled by this Court." *Ibid.*

The State of Louisiana counters that these claims defy a plain reading of the decisions in question. The Louisiana Supreme Court expressly declined petitioner's invitation to expand *Powers* beyond the context of an equal protection attack to race-based exclusions of prospective petit jurors through the use of peremptory challenges. *State of Louisiana v. Campbell*, 661 So. 2d at 1324. In *Powers* this Honorable Court held that a defendant, regardless of his or her race, had standing under the equal protection clause to object to the race-based exclusion of any prospective petit juror whether or not that defendant and the excluded juror shared the same race.

Moreover, in *Peters v. Kiff, supra*, this Honorable Court held that a white defendant had standing to object on the basis of the due process clause to the racial composition of a grand and petit juries even though the claim centered on allegations that

blacks had been systematically excluded.

Given the fact that this Honorable Court **has not decided** whether a white defendant has standing under *Rose v. Mitchell, supra,* to bring an equal protection challenge to alleged racial discrimination against blacks in the context of a state grand jury foreman, the Louisiana Supreme Court was correct not to extend *Powers* beyond its equal protection holding. This is especially true in light of the Louisiana Supreme Court's *dicta* that "[t]he role of the grand jury foreman in Louisiana appears to be similarly ministerial"[2], which was the same conclusion espoused by this Honorable Court in *Hobby* concerning the role of a federal grand jury foreman. *See State of Louisiana v. Campbell,* 661 So. 2d at 1324; and *Hobby,* 468 U.S. at 344. *See also State of Louisiana ex rel. Williams v. Whitley,* 629 So. 2d 343 (La. 1993)(Marcus, J., dissenting, "[t]he role of the foreman of the grand jury in Louisiana also appears to be ministerial in nature.")

Given the holdings of *Powers* and *Peters,* the Louisiana Supreme Court was without express binding authority from this Honorable Court to grant petitioner the relief he was seeking. Furthermore, the Louisiana Supreme Court's decision is also consistent with *Castaneda v. Partida,* 430 U.S. 482, 494 (1977)(Mexican-American defendant had standing under the equal protection clause to object to the exclusion of Mexican-Americans as state grand jurors) and *Rose v. Mitchell,* 443 U.S. at 565,(black defendants had standing under the equal protection clause to challenge exclusion of blacks as state grand jury foremen)[3] in requiring that petitioner establish under the equal protection clause that the "procedures employed resulted in

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[2] Whether or not the duties of a Louisiana grand jury foreman are ministerial would, in the first instance, be a question of state law best left for resolution by Louisiana courts. *See* La.C.Cr.P. art. 436.

[3] Petitioner misconstrues the *Rose* holding by stating that in *Rose* this Honorable Court "held that racial discrimination in the selection of grand

substantial underrepresentation of his race or of the identifiable group to which he belongs." Accordingly, the Louisiana Supreme Court's decision is consistent with decisions of this Honorable Court. Petitioner's claim otherwise is without merit.

III. A perceived conflict of the Louisiana Supreme Court's decision in *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995), with *United States v. Sneed*, 729 F. 2d 1333 (11th Cir. 1984), does not, *ipso facto*, mean that petitioner is entitled to this Honorable's supervisory review, especially where the state court decision is consistent with prior Supreme Court decisions.[4]

Petitioner claims that the Louisiana Supreme Court decision in question here conflicts with *United States v. Sneed*, 729 F. 2d 1333 (11th 1984), and thereby, this Court should invoke supervisory review. *Pet.* at 4, 11, and 23. The United States Court

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jury foremen violated the Fourteenth Amendment to the United States Constitution *and requires reversal of a state conviction.*" (Emphasis added.) While it is clear from the *Rose* decision that discrimination against blacks in the selection of grand jury foremen violates the equal protection clause of the Fourteenth Amendment, it is not clear that such discrimination warrants reversal of a subsequent conviction. In *Rose*, this Honorable Court "assumed, without deciding, that invidious discrimination in the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire." *Id.*, 443 U.S. at 551 n. 4 (Citations omitted.)

[4] Petitioner cites *Bowen v. Kemp*, 769 F. 2d 672 (11th Cir. 1985) as a federal appeals decision that conflicts both with *State of Louisiana v. Terry Campbell*, 661 So. 2d 1321 (La. 1995) and *United States v. Cronn*, 717 F. 2d 164 (1983). The State of Louisiana fails to comprehend this argument given that in *Bowen*, the issue before the federal court revolved around an equal protection claim concerning the exclusion of women from petit jury service. The instant claim before this Honorable Court deals only with an equal protection claim based upon a state's grand jury foreman selection process. Petitioner has not ever claimed discrimination in the selection processes of either state grand juries

of Appeals, Eleventh Circuit, in *Sneed* did not distinguish between discrimination in the selection of a state grand jury foreman and discrimination in the selection of a state grand jury itself. Rather, the 11th Circuit in *Sneed* dealt only with a federal defendant's claim against the federal grand jury foreman selection process, and subsequently extended holdings of Supreme Court cases dealing with discrimination in the selection of grand juries to consider a claim of discrimination in the selection of grand jury foremen. Moreover, the *Sneed* court was bound by clear precedent in the Eleventh Circuit, *United States v. Holman*, 680 F. 2d 1340 (11th Cir. 1982) and *United States v. Perez-Hernandez*, 672 F. 2d 1380 (11th Cir. 1982). As argued below, all of these federal decisions were issued **prior** to *Hobby v. United States, supra*. Furthermore, there is no indication in *Sneed* that an issue before the court was whether a white defendant could bring a claim of racial exclusion of blacks in a state grand jury foreman selection process. The decision clearly centered upon a federal defendant attacking his federal conviction due to alleged discrimination in the selection of federal grand jury foremen. Most importantly, the Eleventh Circuit today may possibly retreat from this line of prior decisions given this Court's binding precedent in the *Hobby* case. *See Sneed*, 729 F. 2d at 1335 n. 3 (finding federal grand jury foreman to be constitutionally significant). Accordingly, given this Court's decision in *Hobby* on a due process claim concerning federal grand jury foremen, and this Court's decisions under the equal protection clause of *Castaneda* and *Rose*, there is no outstanding conflict that has not been resolved.

The State of Louisiana further contends that a conflict alone is insufficient in and of itself to grant supervisory relief. *See*

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or state petit juries. Accordingly, a federal decision not on point with the instant claim could not possibly create the necessary "conflict" by which this Honorable Court invokes supervisory review pursuant to Sup.Ct. Rule 10.

Ramirez v. California, 476 U.S. 1152 (1986)(J. White, dissenting, joined by J. J. Brennan and Powell), wherein the Supreme Court denied a petition for writ of certiorari despite the opinion of dissenting Justices that a conflict existed between a Fifth Circuit Court of Appeals decision and a California Supreme Court decision, and between the latter decision and a Supreme Court decision. *See also Green Bay Packaging, Inc., v. Adams Extract Company*, 473 U.S. 911 (1985)(J. White, dissenting in the denial of a petition for writ of certiorari because of a conflict between decisions of the Fourth Circuit and Fifth Circuit of the United States Court of Appeals.

Accordingly, petitioner has failed to clearly demonstrate that relief is warranted on the basis that the Louisiana Supreme Court's decision is in direct conflict with Eleventh Circuit decisions.

IV. Any perceived conflict between *United States v. Cronn*, 717 F. 2d 164 (5th Cir. 1983) and other decisions of the United States Court of Appeals, 11th Circuit, disappears when one considers that the latter decisions predated *Hobby v. United States*, 468 U.S. 339 (1984).

Finally, petitioner claims review by this Honorable Court is warranted given that *United States v. Cronn*, 717 F. 2d 164 (5th Cir. 1983) conflicts with the following decisions of the United States Court of Appeals, Eleventh Circuit: *United States v. Perez-Hernandez*, 672 F. 2d 1380 (11th Cir. 1982)(*per curiam*); *United States v. Holman*, 680 F. 2d 1340 (11th Cir. 1982); and *United States v. Sneed*, 729 F. 2d 1333 (11th Cir. 1984.) *Pet.* at 11 and 24.

While these decisions at first glance may appear to be in conflict with *Cronn*, all these decisions cited by the petitioner were issued **without the benefit of *Hobby v. United States*, supra,** and dealt with the issue of a federal grand jury foreman,

not a state grand jury foreman. Accordingly, those same federal courts could decide the same issue differently today given the holding of this Honorable Court in *Hobby*. As such, intervention by this Honorable Court to resolve what the petitioner claims is an apparent conflict is clearly not warranted. An examination of the cited federal case law by the instant petitioner shows that the petitioner's claim of a conflict is clearly illusory.

In *United States v. Perez-Hernandez*, 672 F. 2d 1380 (11th Cir. 1982)*(per curiam)*, decided on April 15, 1982, the 11th Circuit held that a hispanic defendant had standing under the equal protection clause to object to the exclusion of blacks and women from service as federal grand jury foremen. It is also noteworthy that the 11th Circuit in *Perez-Hernandez* also rejected the government's argument that the role of a federal grand jury person is "constitutionally insignificant." *Id.* at 1386. *Contrast Hobby, supra*, decided on July 2, 1984. The 11th Circuit also placed heavy reliance on *Peters v. Kiff, supra*, even though that decision was based upon the due process clause as opposed to the equal protection clause.

In *United States v. Holman*, 680 F. 2d 1340 (11th Cir. 1982), decided on July 22, 1982, the 11th Circuit obviously felt bound by *United States v. Perez-Hernandez, supra*, when it held that a white defendant had standing to complain about the exclusion of blacks and women from service as federal grand jury foremen. That Court stated: "...The panel [in *United States v. Perez-Hernandez*] reached that conclusion [of standing] despite its acknowledgement of prevailing Supreme Court precedent which would appear to deny standing to such a defendant:...In accord with our existing precedent, we find standing on the part of the instant appellants." *Id.*, 680 F. 2d at 1355-1356.

Likewise, *United States v. Sneed*, 729 F. 2d 1333 (11th Cir. 1984), decided on April 16, 1984, cites the binding precedent of *United States v. Holman* and *United States v. Perez-Hernandez* for

its decision.

The State of Louisiana contends that petitioner had plainly failed to establish to this Court any viable conflict in the lower federal circuits. Given the holdings of *Hobby*, *Castenda* and *Rose*, *supra*, the federal cases cited by the petitioner fail to prove a jurisdictional basis by which a petition for writ of certiorari should be granted.

V. If this Honorable Court should invoke its supervisory jurisdiction and review the Louisiana Supreme Court's decision below, such review should be limited to only the equal protection claim.

Petitioner claims that the questions presented for review include three federal bases for relief: the equal protection clause, the due process clause and the fair cross-section requirement of the Sixth Amendment. *Pet.* at i. The State counters that the only possible federal question left unresolved for this Honorable Court is whether a white defendant has standing under *Rose* to bring an equal protection claim based upon the exclusion of blacks from a state's selection process for grand jury foremen.

Petitioner's claim that a white defendant has standing to bring a due process attack is foreclosed by this Court's decision in *Hobby*, *supra*. Considering the Louisiana Supreme Court's *dicta* that a Louisiana grand jury foreman's role is ministerial, petitioner's request for relief squarely runs counter to the *Hobby* decision. For the petitioner to distinguish *Hobby* based upon a claimed difference in the selection of a grand jury foreman in the federal system as opposed to the selection of a grand jury foreman in the Louisiana system, clearly rings hollow when the petitioner himself has deliberately chosen not to attack the Louisiana grand jury venire from which his Louisiana grand jury was chosen. Moreover, the Louisiana

Supreme Court in *State of Louisiana v. Mouton*, 395 So. 2d 1337 (La. 1981), upheld the state statutes governing the selection of grand juries in Orleans Parish, whereby the district judge picks each of the 12 grand jurors from the grand jury venire. In *Mouton*, the Louisiana Supreme Court affirmed that La.C.Cr.P. arts. 412, 413 and 414 and La.R.S. 15:114 did not violate the federal due process or equal protection clauses because the defendant had failed to establish an affirmative showing that the system was discriminatory. In the petitioner's case, applicable Louisiana statutes allow district judges of parishes other than Orleans Parish to chose only the grand jury foreman from the grand jury venire; the remaining 11 grand jurors and two alternates are picked randomly and by lot. In light of *Mouton*, petitioner's claim that allowing a district judge to select the grand jury foreman necessarily taints the grand jury itself has no merit. Moreover, the argument fails to account for the petitioner's own decision to forego an attack on Louisiana's system of selecting the grand jury itself. Accordingly, review on the due process claim should be denied.

Finally, petitioner claims he is entitled to federal review on a fair cross-claim analysis under the Sixth Amendment. The State of Louisiana counters that this federal claim has not been heretofore addressed by the state courts in question. A review of the record herein demonstrates that the state courts did not rule on petitioner's Sixth Amendment fair-cross section claim, given the fact the focus was on petitioner's standing to bring either an equal protection attack or a due process attack upon the grand jury foreman selection process itself. Further, the record before this Court does not demonstrate that the petitioner adequately represented a Sixth Amendment fair-cross claim as an adequate basis for relief before the state courts. Given this Honorable Court's policy considerations that state courts should be given the first opportunity to consider the application of state statutes in light of federal constitutional chal-

lenges, this Court's review on this basis is not warranted. *Supreme Court Practice* at 117.

Moreover, authority which petitioner himself cites to this Honorable Court notes in *dicta* that a grand jury foreman attack is not by its nature subject to the Sixth Amendment's requirement of a fair cross-section. *See Sneed, supra,* 729 F. 2d at 1335 n. 2:"[a]lthough the composition of a grand jury or petit jury venire may be challenged under the sixth amendment's guarantee of a right to be tried by a group drawn from a source representing a fair cross-section of the community,...this requirement does not extend to the office of grand jury foreperson because '[o]ne person alone cannot represent the divergent views, experience, and ideas of the distinct groups which form a community.'" (Citations omitted). Accordingly, this Court's review under the Sixth Amendment fair cross-section is not warranted.

CONCLUSION

Based upon the foregoing reasons, the State of Louisiana would respectfully request that this Honorable Court deny the petitioner's application for writ of certiorari to review the judgment of the Louisiana Supreme Court.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General

KATHLEEN E. PETERSEN*
Assistant Attorney General

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Counsel for Respondent

* Counsel of Record

APPENDIXES

APPENDIXES

APPENDIX A — Bill of Indictment, *State of Louisiana v. Terry Campbell.*

APPENDIX B — Letter to Clerk William Suter from Kathleen Petersen, Assistant Attorney General.

APPENDIX C — Letter to Kathleen E. Petersen, Assistant Attorney General, from Dmitrc I. Burnes, Esquire.

APPENDIX D — Letter to Kathleen E. Petersen, Assistant Attorney General, from Francis J. Lorson, Chief Deputy Clerk, Supreme Court of the United States.

APPENDIX A

BILL OF INDICTMENT

STATE OF LOUISIANA **PARISH**
OF **OF**
LOUISIANA **EVANGELINE**

45,690F

In the name and by the authority of the State of Louisiana, the Grand Jurors of the State of Louisiana, duly impaneled, sworn, and charged to inquire within and for the body of Evangeline Parish, State aforesaid, upon their oath do present:

That on or about the 11th day of January, 1992, at the Parish of Evangeline, State of Louisiana, TERRY D. CAMPBELL committed second degree murder of James L. Sharp

contrary to the form of the Statute of the State of Louisiana in such cases made and provided in contempt of the authority of said State and against the peace and dignity of the same.

/s/ J. William Pucheu
District Attorney, 13th Judicial
District of Louisiana

APPENDIX B

LETTER TO CLERK SUTER FROM KATHLEEN PETERSEN, ASSISTANT ATTORNEY GENERAL

State of Louisiana
Department of Justice
Criminal Division
Baton Rouge

Richard P. Ieyoub
Attorney General

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Baton Rouge, Louisiana 70804-9095
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SENT BY FEDERAL EXPRESS

Honorable William Suter
Clerk, Supreme Court of the United States
1 First Street Northeast
Washington, D.C. 20543

RE: No. 95-1240, October Term, 1995
Terry Campbell v. State of Louisiana

Dear Sir:

Pursuant to Rule 30.4, the respondent herewith requests that the time within which to respond to the petition for certiorari be extended 30 days, to and including April 5, 1996. The petition for certiorari was served on and received by respondent, the Honorable J. William Pucheu, District Attorney, Parish of Evangeline, on February 14, 1996, and the brief in opposition is now due, unless extended, on March 6, 1996.

This request is made necessary by the fact that on February 14, 1996, Mr. Pucheu contacted Tim Screen, Director, Louisiana Department of Justice, Office of the Attorney General, Criminal Division, and requested assistance in responding to the petition. Pursuant to that request, Mr. Screen has assigned the undersigned counsel to prepare a brief in

opposition in the above-captioned matter. The undersigned is scheduled to begin trial in *State of Louisiana vs. Catherine A. Doucet*, Docket No. 9-93-1, Parish of East Baton Rouge, 19th Judicial District Court, on three felony counts of theft of $500.00 or more beginning on Monday, February 26, 1996, before the Honorable Bonnie Jackson, Judge, presiding, in Baton Rouge, Louisiana. In order to adequately research legal issues and to review relevant court documents and transcripts, the undersigned hereby requests the extended period herein.

Petitioner's counsel, Dmitrc I. Burnes, contacted this date by telephone, has consented to this request for an extension.

Sincerely yours,

/s/Kathleen E. Petersen
KATHLEEN E. PETERSEN
Assistant Attorney General

Louisiana Department of Justice
Criminal Division
P.O. Box 94095
Baton Rouge, LA 70804-9095
(504) 342-7552

cc/ Mr. Dmitrc I. Burnes, Esq.
Hon. J. William Pucheu, D.A.
Mr. Richard W. Vidrine, Asst. D.A.

APPENDIX C

LETTER TO KATHLEEN E. PETERSEN, ASSISTANT ATTORNEY GENERAL, FROM DMITRC I. BURNES

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Richard V. Burnes
Dmitrc Ian Burnes
E. Grey Talley

Street Address:
711 Washington Street
Alexandria, LA 71301-8030

February 26, 1996

SENT VIA FACSIMILE (504) 342-7893
AND BY FIRST CLASS MAIL

Ms. Kathleen E. Petersen
Assistant Attorney General
Louisiana Department of Justice
Criminal Division
Post Office Box 94095
Baton Rouge, LA 70804-9095

Re: *State of Louisiana v. Terry D. Campbell*
Supreme Court of the United States
Docket Number 95-1240

Dear Ms. Petersen:

This letter confirms our telephone conversation of Friday, February 23, 1996, wherein you advised me that you would be handling the Terry Campbell case for the office of the Attorney General. This letter also further confirms my agreement to your request to include a statement of my lack of opposition to your planned request for an extension of time within which to file your response to our *Petition for a Writ of Certiorari* to be filed with the United States Supreme Court.

With best regards, I am

Very truly yours,

/s/Dmitrc I. Burnes
DMITRC I. BURNES

DIB/mal

cc: Mr. Terry Campbell
Mrs. Clara Campbell

APPENDIX D

LETTER TO KATHLEEN E. PETERSEN, ASSISTANT ATTORNEY GENERAL FROM FRANCIS J. LORSON, CHIEF DEPUTY CLERK, SUPREME COURT OF THE UNITED STATES

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543

William K. Suter
Clerk of the Court

Area Code 202
479-3011

March 4, 1996

Kathleen E. Peterson
Assistant Attorney General
P. O. Box 94095
Baton Rouge, LA 70804-9095

Re: *Terry Campbell v. Louisiana*
No. 95-1240

Dear Ms. Peterson:

Your request for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case has been granted; the time has been extended to and including April 5, 1996.

No further request for an extension of time will be entertained by the Clerk.

Very truly yours,

WILLIAM K. SUTER, Clerk
By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

cc: Richard V. Burnes